IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1841

GREAT LAKES DREDGE & DOCK COMPANY,
Petitioner,

—against—

DEPARTMENT OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Great Lakes Dredge & Dock Company prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York, entered on remittitur on the 27th day of April, 1976, which judgment affirmed a prior determination by the Department of Taxation and Finance of the State of New York (State Tax Commission) which determination assessed a sales and use tax of $288,134.28 (plus interest) against Petitioner and which judgment of the Court of Appeals reversed a deci-

sion of the Appellate Division of the Supreme Court of the State of New York for the Third Department which had annulled the determination of the State Tax Commission and granted to Petitioner relief under Article 78 of the CPLR.

Citations to the Opinions Below

The determination of the State Tax Commission is officially unreported (but is set forth in the appendix herein infra p. 12a *et seq.*)

The opinion of the Appellate Division for the Third Department (printed in the appendix infra p. 8a *et seq.*), is reported at 46 A.D. 2d 533, 363 NYS 2d 674.

The opinion of the Court of Appeals in the State of New York, printed in the appendix (p. 1a *et seq.*) is not as yet officially reported.

Jurisdiction

The opinion of the Court of Appeals is dated March 30, 1976. Judgment of that Court was entered on remittitur on April 27, 1976.

The jurisdiction of this Court is invoked under 28 USCA Section 1257.

Concise Statement of Reasons for Granting Certiorari

Petitioner contends that the reach of a taxing scheme involving interstate commerce must be in accord with acceptable Constitutional principles. It contends that the

action o fthe New York Court of Appeals violated those principles and thus has impermissibly burdened interstate commerce and denied to Petitioner its constitutional right to due process of law.

Petitioner further contends that the Legislature of the State of New York expressly incorporated standards of Federal authority in enacting an exemption statute (New York Tax Law Section 1115(a)(8), whose benefit Petitioner has been denied. It contends that the New York Court of Appeals has applied improper local standards to Petitioner and the dredging industry and thus has denied Petitioner its constitutional right to equal protection of the law.

Constitutional Provisions Involved

This petition involves the following Constitutional provisions.

(1) Article 1 Section 8 Clause 3 (Appendix, p. 29a)

(2) Fourteenth Amendment Section 1 (Appendix p. 29a)

Statutory Provisions Involved

This petition involves the following statutory provisions (which are printed in the appendix (p. 27a *et seq.*):

(1) New York State Tax Law Section 1111(b)

(2) New York State Tax Law Section 1115(a) (8)

(3) New York State Tax Law Section 1118 (7)

Questions Presented

1. Did the action of the New York Court of Appeals, in excising Petitioner and the dredging industry from statutory exemptions granted interstate commerce, effect a constitutionally impermissible burden on that commerce?

2. Did the action of the New York Court of Appeals, in excising Petitioner and the dredging industry from statutory exemptions granted interstate commerce, deny Petitioner and the dredging industry, equal protection of the law as required by the Fourteenth Amendment to the Constitution?

3. Did the action of the New York Court of Appeals, in excising Petitioner and the dredging industry from statutory exemptions granted interstate commerce, deny Petitioner and the dredging industry, due process of law as required by the Fourteenth Amendment to the Constitution?

Importance of the Questions

The judicial excision of the dredging industry from the realm of interstate commerce has importance far transcending the reach of the case at bar.

The following excerpts from the 1973 annual report of the Department of the Army Corps of Engineers (Volume 1) are of significance:

> "Maintaining a navigable passage for ships, boats, and barges requires constant care. Dredging to remove silt and deepen channels is a continuous process, as is removing obstructions and debris (snagging) which endanger the users of the waterways." (page 27)

> "Continuous dredging is necessary to keep the Federal navigation projects free of mud, silt and sand. During FY 73, about 275 million cubic yards were removed in the process of normal maintenance. New construction required the removal of an additional 35 million cubic yards. Additional dredging, not included in these figures, was carried on by the Navy, municipalities, and private organizations." (page 30)

The inland waterways of the United States, it perhaps goes without saying, constitute an essential national resource and are vital to the interstate commerce of this Nation.

> "Ton-miles of freight, carried in 1972 on US inland waterways, including the Great Lakes, totalled 339 billion, a new record and a rise of 24 billion above the total for 1971. Highlighting the gain in the overall United States total, the Mississippi River system advanced 16.1 billion ton-miles over the previous new peak of 158.5 billion." (US Army Corps of Engineers' Annual Report, page 32)

Dredging, of course, is not restricted to channels in inland waterways. The berths which serve foreign and domestic commerce alike must be kept at proper navigational depths. The activities of the dredging industry are essential in maintaining pier and terminal facilities in a proper state of navigational readiness to accommodate both domestic and international traffic.

Some idea of the scope of the commerce involved may be gained from one more statistic derived from the 1973 Annual Report of the Corps of Engineers. It appears that in 1972 the waterborne commerce of the United States (both domestic and foreign) accommodated the staggering figure of 1,616.8 million tons of cargo.

Statement of Case

Petitioner, a New Jersey corporation, owns certain vessels employed in dredging navigable waters of the United States. These consist of dredges, drill boats, cranes, tug boats, scows, launches and oil barges. The vessels were purchased outside the State of New York in various other states. Nonetheless, they were held subject to New York's compensating use tax (New York State Tax Law Section 1111(b)(1) and Section 1111(b)(2)).

The equipment involved (so found by the State Tax Commission) is typically taken from job sites in more than one state, brought across state lines, and assembled at a job site—being dispersed after the job is concluded. During the taxable period involved, the seventeen pieces of equipment assessed, worked in fourteen states and one foreign country and crossed state boundary lines 179 times. All of Petitioner's vessels are capable of making sea voyages and they are licensed by the United States Coast Guard to engage in the coasting trade. Petitioner's work in New York is performed at job sites in three different locations, Albany county, Erie county, and New York City.

The work in Albany involved dredging, producing, as one result, the widening of a navigable river. In Erie county and in New York Harbor the dredging involved deepening of channels near piers and in the bay.

All equipment taxed herein (found the State Tax Commission) performed tasks only on rivers or harbors which are part of the navigable waters of the United States.

During the course of the dredging operations the dredges, drill boats and cranes did not physically traverse state lines. During the dredging operations, tugs and

scows would frequently cross interstate or international boundaries. Launches and oil barges in New York Harbor would frequently cross state boundaries.

Petitioner opposed the assessment of a compensating use tax on its vessels (and certain supplies incident thereto) claiming exemption on the basis of Section 1115(a)(8) of the New York State Tax Law. In this regard, Petitioner claimed that it was within the statutory exemption because the taxed property consisted of vessels "primarily engaged in interstate commerce".

The State Tax Commission rejected petitioner's claims and assessed a compensating use tax upon all of petitioner's vessels considered. It did so finding dredging to be a local activity (citing *Holland Furnace Co. et al.* v. *Department of Treasury of State of Indiana et al.,* 7 Cir., 1943, 133 F.2d 212 at 215-216, cert. den. 320 U.S. 747, 64 S. Ct. 49, 88 L. Ed. 443; *James* v. *Dravo Contracting Company,* 302 U.S. 134, 153, 58 S. Ct. 208, 82 L. Ed. 155). The State Tax Commission further held that, even if dredging were to be considered interstate in nature, the vessels were subject to a use tax if there was a "taxable moment" in the State of New York (citing *Matter of Atlantic Gulf & Pacific Co.* v. *Gerosa,* 1965, 16 NY 2d 1, 261 NYS 2d 32, 209 N E2d 86, app dsmd 382 US 368, 86 S. Ct. 553, 15 L. Ed. 2d 426). Petitioner obtained a review of the determination of the State Tax Commission pursuant to Article 78 of the New York CPLR.

In its decision the Appellate Division of the Supreme Court of the State of New York, Third Department, unanimously reversed the determination of the State Tax Commission and annulled the assessment of tax upon Petitioner. In so holding, the Appellate Division (whose decision is reported at 46 AD 2d 533, 363 NYS 2d, 674,) held that (1) the engagement of petitioner in dredging

navigable rivers and channels of waters of the United States constituted interstate commerce *per se* and (2) *de facto,* the crossing of state and national boundaries by some of Petitioner's vessels constituted interstate commerce.

Appeal was taken to the Court of Appeals for the State of New York. The Court of Appeals unanimously reversed the Appellate Division decision and reinstated the determination of the State Tax Commission.

The Court of Appeals is the highest appellate tribunal in the State of New York. Petitioner has no recourse save by the instant Petition.

POINT I

The action of the New York Court of Appeals has stripped the New York taxing statutes of constitutional validity insofar as they relate to the operations of the dredging industry and vessels engaged in dredging.

Petitioner concedes that "Federal regulation of interstate land and water carriers under the commerce power has not been deemed to deny all state power to tax the property of such carriers". *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment, et al.,* 1954, 347 U.S. 590, 597, 74 S. Ct. 757, 762, 98 L. Ed. 967, 975. This Court has held that a state may impose a tax "upon its fair share of an interstate transportation enterprise". *Norfolk and Western Railway Company, et al.* v. *Missouri State Tax Commission, et al.,* 1968, 390 U.S. 317, 323, 88 S. Ct. 995, 19 L. Ed. 2d 1201, 1206, motion for leave to file petition for reh. den. 390 U.S. 1046, 88 S. Ct. 1633, 20 L. Ed. 2d 311; *Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania,* 1962, 370 U.S. 607, 82 S. Ct. 1297, 8 L. Ed. 2d 720 reh den 371 US 856, 83 S. Ct. 15, 9 L. Ed. 2d 93; *Ott* v. *Mississippi Valley Barge Line Co.,* 1949, 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585.

The Court of Appeals of the State of New York, doubtless viewing these and other decisions of this Court on the subject, reached the conclusion "Preliminarily, it should be made clear that where there is no evidence, and indeed there is none here, that any other jurisdiction has imposed a sales or use tax on the items sought to be taxed, no constitutional problem of burdening interstate commerce by multiple taxation confronts us.* (*Matter of Atlantic Gulf & Pacific Co.* v. *Gerosa,* 16 NY 2d 1, app. dsmd., 382 U.S. 368; see *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167; cf. U.S. Const. art. I, §8)." (Appendix, 3a)

But, the carrying on of commerce among the states is a federally protected right "not left to be destroyed or impeded by the rivalries of local government". *Houston, East & West Texas Railway Company* v. *United States,* 1914, 234 U.S. 342, 350, 34 S. Ct. 833, 58 L. Ed. 1341, 1347, 1348.

At least two constitutional hazards face any state which elects to venture into the thicket of taxation of interstate mobile entities.

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* In the field of interstate commerce, it is the *potential* of double or multiple taxation, not necessarily the actuality, which raises Constitutional problems. *Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania,* 1962, 370 U.S. 607, 614, 615, 82 S. Ct. 1297, 8 L. Ed. 2d 720, 726, 727; *Standard Oil Co.* v. *Peck,* 1952, 342 U.S. 382, 72 S. Ct. 309, 96 L. Ed. 427. The New York State Legislature, in enacting Section 1115(a)(8) had a prudent regard for this principle, as, apparently, the Court of Appeals did not.

The grasp of a state tax scheme may not:

1. Impermissibly burden, harass or obstruct the free flow of interstate commerce:

"(W)ithout the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See *Philadelphia & S. Mail S.S. Co.* v. *Pennsylvania,* supra (122 U.S. 346, 30 L. ed. 1205, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308); *State Freight Tax Case,* 15 Wall, 232, 280, 21 L. ed. 146, 163; Bradley, J., dissenting in *Maine* v. *Grand Trunk R. Co.,* 142 U.S. 217, 235, 35 L. Ed. 994, 997, 12 S. Ct. 121, 163, 3 Inters. Com. Rep. 809; cf. *Pullman's Palace Car Co.* v. *Pennsylvania,* supra, 141 U.S. 26, 35 L. ed. 617, 11 S. Ct. 876, 3 Inters. Com. Rep. 595. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511, 523, 79 L. ed. 1032, 1038, 55 S. Ct. 497, 101 ALR 55." *Western Live Stock* v. *Bureau of Revenue,* 1938, 303 U.S. 250, 256, 58 S. Ct. 546, 549, 82 L. Ed. 823, 828. See also, *Standard Oil Co.* v. *Peck,* 1952, 342 U.S. 382, 385, 72 S. Ct. 309, 96 L. Ed. 427, 430.

2. Whatever "fair share" a state attempts to impose upon interstate enterprise must be rationally allocated and represent an equitable distribution of tax burden in "relation to opportunities, benefits, or protection conferred or afforded by the taxing State". *Ott* v. *Mississippi Valley Barge Line,* 1949, 336 U.S. 169, 174, 69 S. Ct. 432, 434, 93 L. Ed. 585, 589.

Petitioner submits that the preoccupation of the New York Court of Appeals (and that of the State Tax Commission as well) with its prior holding in the *Gerosa* decision (above cited) is more than any other factor the cause of the constitutional error in the instant case.

We may note that the taxpayer in the *Gerosa* case neither raised, nor relied upon, the provisions of Article 1115(a)(8).

Nor did the Court of Appeals consider the effect of Article 1115(a)(8) in the *Gerosa* case.

Nor did the Court of Appeals take note of the fact that Article 1115(a)(8) was not even in effect during the period of applicability of the *Gerosa* decision. The stark fact is that, upon the enactment of Article 1115(a)(8), the State of New York had no formula, no method of allocation, no device for computing the "fair share" of tax to be borne by vessels engaged "primarily in interstate commerce", since the Legislature of the State of New York had decided to exempt entirely such vessels from the adhesion of sales and compensating use taxes.**

The Legislature of the State of New York might have enacted a coherent, equitable and consistent tax scheme reaching vessels in interstate commerce, a scheme constitutionally valid. *Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania,* 1962, 370 U.S. 607, 82 S. Ct. 1297, 8 L. Ed. 2d 720 reh den 371 U.S. 856, 83 S. Ct. 15, 9 Ed. 2d 93; *General Motors Corpora-*

** Nor are we unmindful of New York Tax Law, Section 1118(7) which, in effect, grants a credit for sales or use taxes paid to a "first taxing jurisdiction". No provision is made for relief where a second or third taxing jurisdiction intervenes. More importantly, even this partial relief is expressly conditioned upon the existence of reciprocity. If one were to view this Section as allocative in nature, it falls far short of the Constitutional mark.

tion v. *Washington, et al.*, 1964, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430; *Pan American World Airways, Inc.* v. *The Duly Authorized Government of the Virgin Islands,* 3 Cir., 1972, 459 F. 2d 387, 392, et seq.

But, if the exercise of state taxation upon interstate commerce is not implemented by a constitutionally permissible formula, the entire tax must fail. *Standard Oil Co.* v. *Peck,* 1952, 342 U.S. 382, 72 S. Ct. 309, 96 L. Ed. 427.

A reading of the Exemption Statute relied upon by Petitioner herein discloses that the legislature of the State of New York elected to avoid the entire spectrum of constitutional problems altogether. In short, the statute, Section 1115(a)(8) represents a cutting of the Gordian Knot.

At every level throughout the history of these proceedings, Petitioner has urged, supported and relied upon the constitutional validity of Section 1115(a)(8). It has pointed out that the action of the State Tax Commission in arbitrarily disregarding the applicability of the statutory language created constitutional flaws in an enactment whose constitutionality we fully endorsed.

The Appellate Division of the Supreme Court subscribed to this position and gave to the Exemption Statute its correct, constitutional effect.

The Court of Appeals has not.

The construction of a state law by the highest Appellate Court of the state is entitled to great weight, but this construction cannot preclude the Supreme Court from a consideration of constitutional questions implicit in such construction. *Crew Levick Company* v. *Commonwealth of Pennsylvania,* 1917, 245 U.S. 292, 294, 38 S. Ct. 126, 62 L. Ed. 295, 298; *St. Louis Cotton Compress Company* v. *State of Arkansas,* 1922, 260 U.S. 346, 348, 43

S. Ct. 125, 67 L. Ed. 297, 298; *T. L. Carpenter* v. *A.S.J. Shaw,* 1930, 280 U.S. 363, 50 S. Ct. 121, 74 L. Ed. 478; *Angel* v. *W. H. Bullington,* 1947, 330 U.S. 183, 189, 67 S. Ct. 657, 91 L. Ed. 832, 836.

The paramount authority of this Court has particular force when applied to a state tax alleged to be burdensome upon interstate commerce. *Standard Oil Company* v. *H. T. Graves,* 1919, 249 U.S. 389, 394, 39 S. Ct. 320, 63 L. Ed. 662, 666; *T. L. Carpenter* v. *A.S.J. Shaw,* supra; *Crew Levick Co.* v. *Commonwealth of Pennsylvania,* supra.

A priori, what is and what is not within the ambit of interstate commerce is the concern of this Court, and the failure of the highest State Court to address the issue properly does not debar consideration here of the constitutional issues. *Corn Products Refining Company* v. *V.C. Eddie,* 1919, 249 U.S. 427, 432, 39 S. Ct. 325, 63 L. Ed. 689, 693.

The keystone of the decision of the Court of Appeals is to be found in the following language:

> "Dredging is, generally speaking, confined to a specified, limited area for the purpose of constructing new waterways or, as was the case here, effecting repairs of old waterways. Thus, while vessels may by their very nature be mobile in themselves and movable from one state or country to another, the movement is incidental to the localized activity of dredging, and it is the localized nature of this activity which permits assessment of the tax against Petitioner . . ."
>
> and
>
> "That the work was performed upon interstate waterways is not a dispositive factor." (Appendix p. 5a)

This Court has specifically held that it is beyond the power of a state court, even the highest state court, to section a class of activity federally recognized as homogeneous and to deny the attributes of interstate commerce to an entity entitled to such recognition within the purview of federal concern.

> "The contention that in Commerce Clause cases, the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. *Wickard* v. *Filburn,* 317 U.S. 111, 127-128, 87 L. Ed. 122, 136, 63 S. Ct. 82; *Polish Alliance* v. *Labor Board,* 322 U.S. 643, 648, 88 L. Ed. 1509, 1515, 64 S. Ct. 1196; *Katzenbach* v. *McClung,* supra, 301, 13 L. Ed. 2d 296." *Maryland* v. *Wirtz,* 1968, 392 U.S. 183, 192-193, 88 S. Ct. 2017, 2022, 20 L. Ed. 2d 1020, 1029.

We may note, preliminarily, that the Federal Courts do not turn a blind eye upon the substantial effect even nominally intra state activities may have upon the interstate commerce of the U.S. *Katzenbach* v. *McClung,* 1964, 379 U.S. 294, 302, 85 S. Ct. 377, 13 L. Ed. 2d 290, 297; *Maryland* v. *Wirtz,* supra. The maintenance of interstate commerce by even a purely intra state enterprise falls under the Federal ken. *Bethlehem Steel Company* v. *New York State Labor Relations Board,* 1947, 330 U.S. 767, 772, 773, 67 S. Ct. 1026, 91 L. Ed. 1234, 1245; *United States* v. *Webb,* 5 Cir., 1972, 463 F. 2d 1324, 1326.

Petitioner's contention herein, however, is that, under applicable Federal law, its activities were not only "primarily" but were rather "exclusively" interstate in nature.

The broadness of the constitutional concept of "commerce" is firmly rooted in our judicial history.***

Whether or not a state forum professes to be indifferent to the actual state of Federal law relating to interstate commerce, Federal concern with, and dominion over, the navigable waters of the United States is dominant. *Wyandotte Transportation Company* v. *United States,* 1967, 389 U.S. 191, 201, 88 S. Ct. 379, 19 L. Ed. 2d 407, 415; *United States* v. *R.B. Rands,* 1967, 389 U.S 121, 88 S. Ct. 265, 19 L. Ed. 2d 329. Indeed, it has been expressed by this Court that the Federal power over improvements for navigational purposes is absolute. *United States* v. *Appalachian Electric Power Company,* 1940, 311 U.S. 377, 404, 405, 61 S. Ct. 291, 85 L. Ed. 243, 251. This Court has also noted the affirmative obligation of the Federal Government to insure that navigable waterways remain free of obstruction. *Wyandotte,* supra.

Physical movement, in or out of the State, is by no means required for Federal recognition of an activity as interstate commerce. Thus, stevedoring (*Puget Sound Stevedoring Company* v. *Tax Commission of the State of Washington,* 1937, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68; *Joseph* v. *Carter & Weeks Stevedoring Company,* 1947, 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993), bridge operation (*Philadelphia, Baltimore & Washington Railroad Company* v. *Alfred H. Smith,* 1919, 250 U.S. 101, 39 S.

*** Thus, in referring to the decision of this Court in *Gibbons* v. *Ogden,* 1824, 22 US 1, 6 L. Ed. 23, the Court of Appeals for the DC Circuit said in *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.,* DC Cir., 1968, 404 F.2d 804, 812 Cert. den. 393 U.S. 1093, 89 S. Ct. 872, 21 L. Ed. 2d 784 "*Gibbons* v. *Ogden* makes clear that, as used in the Constitution, 'commerce' is a very broad concept which includes navigation—not merely because of the relationship between shipping and the movement of goods, most certainly commerce, but also because shipping itself is a form of gainful economic activity."

Ct. 396, 63 L. Ed. 869; *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company,* 1913, 229 U.S. 146, 33 S. Ct. 648, 57 L. Ed. 1125; *Levingston Shipbuilding Company* v. *Ailes,* 5 Cir., 1966, 358 F. 2d 944; *Puente de Reynosa, S.A.* v. *City of McAllen,* 5 Cir., 1966, 357 F. 2d 43), highway maintenance (*Crook* v. *Bryant,* 4 Cir., 1959, 265 F. 2d 541), operation of public wharves, piers and terminals (*American Export-Isbrandtsen Lines, Inc. et al.* v. *Federal Maritime Commission,* DC Cir., 1970, 444 F. 2d 824; *Slover* v. *Wathen,* 4 Cir., 1944, 140 F. 2d 258), the maintenance of dikes and revetments (*Walling* v. *Patton-Tulley Transportation Co.,* 6 Cir., 1943, 134 F. 2d 945), and the maintenance of telephone conduits (*Walling* v. *McGrady Construction Co.,* 3 Cir., 1946, 156 F. 2d 932), have all been recognized, in appropriate Federal forum, as aspects of the interstate commerce of the United States—notwithstanding lack of physical transit in or out of a state.

The Federal Judiciary System has not been insensitive to the vital importance of the dredging industry to the waterborne commerce of the United States. Decisional law is replete, with many holdings by many courts, that dredging operations are, in and of themselves, interstate commerce. That dredging is, per se, interstate commerce flows naturally from the essential relation of this activity to the proper functioning of inland navigation. *Ritch* v. *Puget Sound Bridge & Dredging Co.,* 9 Cir., 1946, 156 F. 2d 334, 336; *Walling* v. *Bay State Dredging & Contracting Co.,* 1 Cir., 1945, 149 F. 2d 346, 350, cert. den., 326 U.S. 760, 66 S. Ct. 140, 90 L. Ed. 457; *Walling* v. *Great Lakes Dredge & Dock Co.,* 7 Cir., 1945, 149 F. 2d 9 cert. den., 326 U.S. 760, 66 S. Ct. 140, 90 L. Ed. 457; *Cuascut* v. *Standard Dredging Corp.,* DC PR, 1950, 94 F. Supp. 197; *Walling* v. *Sternberg Dredging Co.,* DC ED Mo., 1946, 64 F. Supp. 758; *Atlantic Gulf and Pacific Company* v. *State Department of Assessments and Taxation,* Md.

Ct. of App., 1969, 252 Md. 173, 249 A(2d) 180, 1969 AMC 795. See also decisions cited by the Attorney General of the United States, "Non applicability of the Foreign Dredge Act to the Virgin Islands", 1963, 42 Op. No. 13 (pp. 36).

This imposing—and presumptively conclusive—body of Federal Law was given full credence and effect by the Appellate Division. Strangely enough, the Court of Appeals gave neither weight nor even mention to the corpus of Federal law on the subject.

The failure of the highest State Court to apply Federal standards to measure the limits of a federally protected class merits the constitutional censure of this Court.

POINT II

The action of the Court of Appeals of the State of New York in excising Petitioner and the dredging industry from the applicability of the statutory tax exemption involved constitutes a violation of the constitutional requirement of equal protection under the law.

It has been said that the constitutional mandate that all shall be accorded equal protection of the law is not merely an abstract right. *Hill* v. *State of Texas,* 316 U.S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559. Chief Judge Stone (316 U.S. at page 406) said:

> "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

As we have previously noted, Petitioner does not challenge the constitutional validity of Section 1115(a)(8). Instead, it champions the constitutionality of such provision, but challenges the action of the highest Court of the State of New York in denying to Petitioner protection under that Section.

For purposes of the Fourteenth Amendment, the action of the highest court of a state is that of the state itself. *Twining* v. *State of New Jersey,* 1908, 211 U.S. 78, 90, 91, 29 S. Ct. 14, 53 L. Ed. 97, 102, 103; *Shelley* v. *Kraemer,* 1948, 334 U.S. 1, 15, 68 S. Ct. 836, 92 L. Ed. 1161, 1181 (and cases cited therein in footnote 14).

That Petitioner is a corporation should not act to its prejudice since a corporation is no less entitled to the constitutional guarantee of equal protection under the law than is an individual. *Grosjean* v. *American Press Company,* 1936, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660. That Petitioner is a corporation foreign to the State of New York does not imply that it may be discriminated against by the action of that State. *WHYY, Inc.* v. *Borough of Glassboro, et al.,* 1968, 393 U.S. 117, 119, 89 S. Ct. 286, 21 L. Ed. 2d 242, 244, 245.

We do not assert that a state is powerless to make distinctions among various classes of entities subject to its taxing power. However, any guidelines established by a state to distinguish among various classes of entities must, in order to be valid under the constitutional requirement of equal protection, be reasonable, rational and proportioned to the end in view. They may neither be arbitrary nor improperly discriminatory. *Truax* v. *Corrigan,* 1921, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254; *Allied Stores of Ohio, Inc.* v. *Bowers,* 1959, 358 U.S. 522, 527, 79 S. Ct. 437, 3 L. Ed. 2d 480, 485; *Eastman, et al.* v. *Yellow Cab Co., et al.,* 7 Cir., 1949, 173 F. 2d 874, 881, 882.

In the *Allied Stores* case (supra) this Court summarized the applicable decisions and stated the rule thusly:

> ". . . (t)he classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation'." 358 U.S. at page 527, 3 L. Ed. 2d 480 at page 485.

Then too, a law nondiscriminatory on its face (as indeed is the statute involved herein) can be made invidious by the operation or construction of the statute. *Griffin* v. *People of the State of Illinois,* 1956, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891; *Concordia Fire Insurance Company* v. *People of the State of Illinois,* 1934, 292 U.S. 535, 54 S. Ct. 830, 78 L. Ed. 1411. In *Township of Hillsborough* v. *Doris Duke Cromwell,* 1946, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358, Mr. Justice Douglas, speaking for a unanimous court, put the principle succinctly:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment." 326 U.S. at page 623, 90 L. Ed. at page 363. See also, *Allied Stores of Ohio Inc.* v. *Bowers,* supra.

In the case at bar, Petitioner (as well as others engaged in the dredging industry) are demonstrably members of a coherent and uniform class, i.e., interstate maritime commerce. That class has been well understood, by appropriate decisional law, to fully comprehend Petitioner and others in the dredging industry within the scope of such class. The Exemption Statute was enacted in terms of a comprehensive and comprehensible classification

("vessels engaged primarily in interstate commerce"). The criteria which represent the objective of the legislation are well known, fully supportable and far from esoteric.

The action of the New York Court of Appeals in sectioning a comprehensive class and arbitrarily excising Petitioner from its operation constitutes the very type of denial of equal protection of laws which has been condemned on many occasions by this Court. The action of the New York Court of Appeals is demonstrably deficient in not resting "upon some ground of difference having a fair and substantial relation to the object of the legislation".

It should be stricken as constitutionally invalid.

POINT III

The action of the New York State Court of Appeals in excising Petitioner and the dredging industry from interstate commerce violates due process of law.

We have pointed out that the statutory exemption, Section 1115(a)(8) of the New York Tax Law, is broadly based—and is specifically posited upon an apprehension of the scope and content of "Interstate Commerce" (Points I and II, infra).

The action of the State Tax Commission and, later, of the New York Court of Appeals represents an excision of the dredging industry from the federally recognized concept of "Interstate Commerce".

But, the wrongful imposition of a tax upon a federally recognized class—"Interstate Commerce"—represents a denial of Due Process under the Fourteenth Amendment

to the Constitution. *National Bellas Hess Incorporated* v. *Department of Revenue of the State of Illinois,* 1967, 386 U.S. 753, 756, 87 S. Ct. 1389, 18 L. Ed. 2d 505, 508; *Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania,* 1962, 370 U.S. 607, 621-622, 82 S. Ct. 1297, 8 L. Ed. 2d 720, 730, 731, reh den 371 US 856, 83 S. Ct. 15, 9 L. Ed. 2d 93.

In construing the reach and scope of "Interstate Commerce", the New York Court of Appeals appears to have had recourse solely to some peculiarly New York doctrine of construction at variance with the federal body of law on the subject (Cf. Point I, infra). The use, by the highest court of a state, of a standard of law at odds with the applicable federal jurisprudence, denies to Petitioner due process of law, where the statute being construed expressly adopts a subject category peculiarly cognizable by the Federal law. In the realm of Constitution Law, wherein Interstate Commerce is concerned, a solipsistic approach by the highest tribunal of a state, produces an impermissible result when adopted in a field of intrinsic Federal concern.

Petitioner, and the dredging industry as a whole, have been denied due process of law.

CONCLUSION

Petitioner respectfully submits that the foregoing warrants allowance by this Court of the Writ sought.

Respectfully submitted,

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APPENDIX

Opinion and Judgment of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

3 No. 119

In the Matter of GREAT LAKES DREDGE & DOCK COMPANY,

Respondent,

vs.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Appellant.

(119)

Louis J. Lefkowitz, Attorney-General (*Francis V. Dow* and *Ruth Kessler Toch* of counsel) for appellants.

James M. Leonard for respondents.

GABRIELLI, J.:

In this article 78 proceeding, petitioner, a New Jersey corporation which carries on widespread dredging and other marine construction operations in various states

and foreign countries, seeks to annul the determination of respondent State Tax Commission which assessed a sales and use tax of $288,134.28 plus interest against respondent. During the period from August 1, 1965 through May 31, 1968, the period upon which the assessment is based, petitioner conducted dredging operations in Albany County, Erie County and New York City.

The sole issue, as limited by petitioner's brief, is whether vessels and supplies used in connection therewith are entirely exempt from the sales and use tax by virtue of the provisions of paragraph 8 of subdivision a of section 1115 of the Tax Law which exempts from such tax "[c]ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs • • •".

Following a hearing, the State Tax Commission assessed a sales and use tax against two dredges, two cranes, a drillboat, a tugboat and 11 scows, as well as supplies expended on these and other vessels owned and used by petitioner in New York dredging operations. The Commission found that the equipment was moved across state lines for the purpose of assembling at a job site and, of course, dispersing after the job is completed but that in general the movement of dredges is restrictively limited, and that the actual work is performed while the dredge is fixed in one place by a special type of anchor which extends to the floor of the harbor or river bed. It was specifically found that the dredges, drillboats and cranes did not move across state lines while engaged in their usual work tasks. However, some tugboats and scows which were used to haul disposal materials did cross state lines to dump their loads. Nonetheless, the Commission found the evidence

submitted by petitioner was not sufficient to show that the activity of these boats, together with all the other evidence, brought the operation within the exclusionary provision of the statute.

The Commission determined that the use tax was applicable to the vessels and supplies purchased for them and that the statutory exemption (Tax Law, §1115[a][8]) does not apply to dredging operations because such operations were found to be and are most appropriately recognized as a part of local and not interstate commerce; and that with respect to the exemption claimed for the tugs and scows operating in and out of the State, the lack of proof as to the time each vessel was so operating (a burden not met by petitioner), was fatal to petitioner's claim. The Appellate Division annulled the determination and granted the petition concluding that the waterways petitioner dredges are "the very arteries of interstate travel" and thus reasoned that the business of improving them must be in interstate commerce.

Preliminarily, it should be made clear that where there is no evidence, and indeed there is none here, that any other jurisdiction has imposed a sales or use tax on the items sought to be taxed, no constitutional problem of burdening interstate commerce by multiple taxation confronts us (*Matter of Atlantic Gulf & Pacific Co* v *Gerosa*, 16 N Y 2d 1, app dsmd, 382 U S 363; see *Southern Pacific Co* v *Gallagher*, 306 U S 167; cf U S Const, art I, §8). Nor can it be successfully contended that vessels and supplies used in dredging operations are still in the stream of interstate commerce or do not have a taxable moment in this State, for we rejected that very assertion in *Atlantic Gulf* (16 N Y 2d at pp 7-8, *supra;* see also, *United Air Lines* v *Mahin*, 410 U S 623; *Southern Pacific Co* v *Gallagher*,

supra; Eastern Air Transp v. *Tax Comm'n,* 285 U S 147; *Matter of United Air Lines* v. *Joseph,* 281 App Div 876, lv to app den, 306 N Y 981).

The general rules applicable to the interpretation of a statute creating an exemption from tax are set forth in *Matter of Young* v *Bragalini* (3 N Y 2d 602, 605-606) where we stated:

> "Where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the court's function is limited (*Board* v *Hearst Publications,* 322 U S 111, 131). In such matters we may not substitute our judgment in place of the judgment of the administrative agency where reasonable minds may differ as to the probative force of the evidence (*Matter of Kopec* v. *Buffalo Brake Beam-Acme Steel & Malleable Iron Works,* 304 N Y 65, 71; *Matter of Kilgus* v. *Board of Estimate,* 308 N Y 620, 627). This is so even in face of the general rule that a tax statute is to be construed in favor of a taxpayer (*People ex rel Mutual Trust Co* v *Miller,* 177 N Y 51, 57; *Matter of Voorhees* v *Bates,* 308 N Y 184, 188), for that rule does not supplant nor does it disregard classic standards. It is clear beyond dispute that, when we are dealing with a claim for exemption from taxation 'it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption' (*People ex rel Savings Bank of New London* v *Coleman,* 135 N Y 231, 234). 'The policy of the law is to construe statutes exempting property from taxation somewhat rigidly, and not to permit such exemption to be established by doubtful implication' (*People ex rel Mizpah Lodge* v *Burke,* 228 N Y 245, 247-248). In this instance, the Legislature has specifically relegated the determination of these questions to the Tax Commission."

Only recently we had occasion to restate and confirm these rules in *Matter of Grace* v *New York State Tax Comm* (37 N Y 2d 193, 195-196).

Applying these principles here, we uphold the determination of the State Tax Commission. Dredging is, generally speaking, confined to a specified, limited area for the purpose of constructing new waterways or, as was the case here, effecting repairs of old waterways. Thus, while vessels may by their very nature be mobile in themselves and movable from one state or country to another, the movement is incidental to the localized activity of dredging, and it is the localized nature of this activity which permits assessment of the tax against petitioner (see *Holland Furnace Co* v *Department of Treasury of the State of Indiana,* 133 F 2d 212, 215-216, cert den 320 U S 747; *James* v *Dravo Contracting Corp,* 114 F 2d 242, 246-247). The burden which petitioner mus shoulder to establish that it is entitled to exemption has not been met and, hence, we find no error in respondent's determination that the vessels, and supplies used in connection therewith, were not "primarily engaged in interstate commerce".

That the work was performed upon interstate waterways is not a dispositive factor. In *Niagara Junction Ry Co* v *Creagh* (2 A D 299, affd 3 N Y 2d 831) we affirmed a holding that locomotives used locally to switch cars and freight on interstate railroad tracks were subject to local use taxes. It was there emphasized that while the locomotives were related to the current of interstate commerce, nevertheless

their activities in general were a taxable local event, separate and distinct from interstate commerce. Similarly, in *Matter of Mallia* (*Corsi*) (299 N Y 232) we held that a corporation which insulated pipes and mechanical equipment on board ships was not engaged in interstate commerce despite the fact that its employees crossed state lines to go from one job to another, or that interstate communications were used to direct corporate operations, or that the ships upon which work was being performed, were themselves engaged in interstate commerce. Indeed, the Supreme Court has held that the private corporate operation of an international bridge spanning the Detroit River between Michigan and Canada did not constitute foreign or interstate commerce so as to exempt the corporation from state taxes (*Detroit International Bridge Co* v *Corporate Tax Appeal Board*, 294 U S 83).

It is well to emphasize what was stated by the Chief Judge in *Matter of Grace* v *New York State Tax Comm* (*supra*, at 195, 196): "If there are any facts or reasonable inferences from the facts to sustain it, the court must confirm the Tax Commission's determination. Thus, a determination of the Tax Commission will not be disturbed by the courts unless shown to be erroneous, arbitrary or capricious (see, also, *People ex rel Maloney* v *Graves*, 289 N Y 178, 180; *People ex rel Hull* v *Graves*, 289 N Y 173, 177; *People ex rel Freeborn & Co* v *Graves*, 257 App Div 587, 590)". None of these impediments may be here found.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, the determination of the State Tax Commission confirmed, and the petition dismissed.

• • •

Judgment reversed, with costs, the determination of the State Tax Commission confirmed, and the petition dismissed. Opinion by Gabrielli, J. All concur.

Decided March 30, 1976

Decision and Opinion of the New York Supreme Court, Appellate Division, Third Department

46 A.D.2d 533

In the Matter of GREAT LAKES DREDGE & DOCK CO.,

Petitioner,

v.

STATE TAX COMMISSION,

Respondent.

Supreme Court, Appellate Division, Third Department
Feb. 6, 1975.

Before HERLIHY, P. J., and GREENBLOTT, KANE, MAIN and REYNOLDS, JJ.

KANE, Justice.

Petitioner, a New Jersey corporation authorized to do business in New York, seeks to annul a determination of the State Tax Commission which, following a hearing, assessed a sales and use tax against it for a taxable period from August 1, 1965 through May 31, 1968. The amount of the tax is not contested. Instead, petitioner claims a total exemption therefrom by reason of paragraph (8) of subdivision (a) of section 1115 of the Tax Law which provides relief from such taxes when arising from "[c]ommercial vessels primarily engaged in interstate or foreign commerce and properly used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship)."

Petitioner is a marine contractor primarily engaged in dredging operations. During the questioned tax period it performed work in Albany County, Erie County and the City of New York which involved, *inter alia,* the dredging, widening and excavation of navigable waterways in those areas. To accomplish these tasks, petitioner employed several floating dredges, cranes, drillboats, tugs, scows, barges and launches, purchasing the ordinary supplies for their use as needed. Although some of this equipment was not itself deemed subject to tax for reasons not here relevant, respondent imposed a sales or use tax on certain remaining equipment and on all the supplies engaged or consumed in furtherance of the New York projects.

In Matter of Atlantic Gulf & Pacific Co. v. Gerosa, 16 N.Y.2d 1, 261 N.Y.S.2d 32, 209 N.E.2d 86, certain compensating use tax features of the Administrative Code of the City of New York and regulations promulgated thereunder were examined by the Court of Appeals. The foreign corporation involved in that case was found liable for such taxes arising from the use of a dredge and certain pipes brought by it into the City for work on a harbor project but removed thereafter, despite its objection that the tax placed an unconditional burden on interstate commerce. The Tax Commission's argument that this opinion somehow characterized dredging operations as a local activity, intrastate in nature from which a "taxable moment" could occur, is not dispositive of the issues presented in this proceeding. In the first place, the statutory scheme reviewed therein was totally devoid of any

language of exemption similar to that now contained in paragraph (8) of subdivision (a) of section 1115 of the Tax Law. In addition, the court plainly stated that the mere possibility of multiple State taxation would not suffice to support a viable constitutional objection (16 N.Y. 2d 1, 6, 261 N.Y.S.2d 32, 35, 209 N.E.2d 86, 88). However, the petitioner here is not pressing any constitutional claim; it merely desires an exemption within the existing tax structure.

The question of whether petitioner has demonstrated entitlement to this particular exemption appears to be one of first impression. Nevertheless, we find respondent's present determination to be without substantial evidentiary support and clearly erroneous. There is and can be little doubt but that the taxed supplies were used on taxed equipment constituting "commercial vessels." Thus, both categories would be exempt if those vessels were further demonstrated to be "primarily engaged in interstate or foreign commerce." As noted, the Tax Commission maintains that dredging activities in New York are purely intrastate in nature and contends, alternatively, that petitioner failed to adduce sufficient proof of interstate movement of these vessels to permit a finding that they were engaged in the requisite type of commerce. We find these contentions unacceptable. Petitioner's business is the improving of the very arteries of interstate travel and certainly such activities must be construed as "interstate commerce" within the contemplation of the statute (cf. Southern Pac. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586). In addition, there was abundant proof that, wholly apart from the work actually performed in this jurisdiction, petitioner's vessels were continually moved, both before and during the tax period,

from state to state and did not come to rest for use or consumption in the local business of this State (cf. Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814).

The determination should be annulled, and the petition granted, with costs.

Determination annulled, and petition granted, with costs.

HERLIHY, P.J., and GREENBLOTT, MAIN and REYNOLDS, JJ., concur.

Determination of State Tax Commission

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application

of

GREAT LAKES DREDGE & DOCK COMPANY

for a Hearing to Review a Determination of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period August 1, 1965 through May 31, 1968.

Great Lakes Dredge and Dock Company applied pursuant to Tax Law section 1138 for a hearing to review a determination issued under date of November 8, 1968, for sales and use taxes due under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through May 31, 1968. A hearing was duly held on March 4, 1970, November 3, 1971, and May 9, 1972, before Nigel G. Wright, Hearing Officer. Christopher E. Heckman, Esq., of McHugh, Heckman, Smith & Leonard, represented the applicant. Saul Heckelman, Esq., appearing by Alexander Weiss, Esq., represented the Sales Tax Bureau. The record of said hearing has been duly examined and considered.

ISSUES

The issues in this case are whether certain vessels and certain supplies purchased for those and similar vessels,

are exempt from use tax when the vessels are used for dredging operations. The exemptions are claimed by reason of (1) the interstate commerce clause of the United States Constitution and, (2) Tax Law section 1115(a)(8) providing for the exemption of "commercial vessels primarily engaged in interstate or foreign commerce . . .". The exemption is claimed with respect to three types of vessels, and the supplies purchased for them, which are (a) dredges, drillboats and cranes; (b) tugboats; (c) scows towed by tugs, and; (d) launches and oil barges used in conjunction with other vessels.

FINDINGS OF FACT

1. Taxpayer is a corporation organized under the laws of New Jersey, with its executive office in Chicago, Illinois, and with other offices in various cities in the United States including New York City and Buffalo, New York. The corporation is authorized to do business in many states and in foreign countries. It carries on its dredging, marine and other construction operations in various parts of the United States, including New York State and also Canada, the Caribbeans and Latin America. In New York State, the taxpayer maintains repair and storage yards on the north shore of Staten Island, a dock at Tottenville on the southend of Staten Island and offices in Manhattan and in Buffalo.

2. The taxes as determined on November 8, 1968, amount to $325,610.07, plus penalty and interest of $75,511.22 for a total of $401,121.29. At the hearing, the taxes due were redetermined to amount to $288,134.28, plus penalty and interest. The taxes due are attributable as follows:

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	Tax on Value of Vessels	*Tax on Purchases of Supplies for for Vessels*	*Tax on "Prior Contracts"*	TOTAL
Dredges	$ 58,487.88	$ 90,016.90	$ 411.16	$148,915.94
Cranes	407.42	886.63	43.98	1,338.03
Drillboats	224.92	1,762.99	3.36	1,991.27
Tugs	27,973.08	19,768.56	227.86	47,969.50
Scows	66,749.36	16,164,80	274.51	83,188.67
Barges	–0–	1,515.60	3.03	1,518.63
Launches	–0–	3,587,82	203.97	3,791.79
	$153,842.66	$113,703.30	$1,167.87	$288,713.83
			—579.54	—579.54
			$ 588.33	$288,134.29

3(a) The vessels in issue here are the following, together with the jurisdictions in which they were found to be taxable and the tax found to be due on each:

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	Albany Co.	*Erie Co.*	*N.Y.C.*	TOTAL
Dredge Cleveland			$ 32,069.31	
Dredge #50			26,418.57	
Crane #9	$283.45			
Crane #11	123.97			
Drillboat #3	224.92			
Tug Lynn			27,973.08	
Scow #13			8,531.25	
" #14			8,531.25	
" #15			590.00	
" #16			510.00	
" #17			500.00	
" #70		$ 456.00		
" #71		440.00		
" #72		408.00	450.00	
" #73		424.00	450.00	
" #94			22,729.43	
" #95			22,729.43	
	$632.34	$1,728.00	$151,482.32	$153,842.66

3(b) The tax due on the vessels was computed on the basis of purchase price or on the basis of market value, if appropriate, under section 1111(b)(1) of the Tax Law,

or on the basis of rental value, if appropriate, under section 1111(b)(2) of the Tax Law.

4(a) The purchase of supplies here in issue were used on the many vessels of applicant which were in New York waters. These included approximately 15 dredges, 6 cranes, 3 drillboats, 10 tugs, 39 scows, 10 barges, and 11 launches. (Many of these vessels were not deemed to be themselves subject to use tax because of their use in New York prior to the imposition of the New York State sales tax.)

The amount of tax found to be due on purchases of supplies according to type of vessel and jurisdiction in which the vessel was working is as follows:

	Albany Co.	*Erie Co.*	*N.Y.C.*	TOTAL
Dredges	$37,939.21	$2,129.43	$49,948.26	$ 90,016.90
Cranes	273.49	309.51	303.63	886.63
Drillboats	62.64	.13	1,700.22	1,762.99
Tugs	1,911.09	1,346.76	16,510.71	19,768,56
Scows	112.33	1,678.93	14,373.54	16,164.80
Barges	–0–	–0–	1,515.60	1,515.60
Launches	206.14	1,361,74	2,019.94	3,587.82
	$40,504.90	$6,826.50	$86,371.90	$133,703.30

4(b) The amount of tax on purchases was taken directly from the taxpayer's computer records showing accrued

taxes which were unpaid by reason of a claimed exemption, after such records had been verified by a test check against purchase invoices which also showed the account charged. Purchases charged to a particular contract or property account were allocated among the vessels by agreement.

5. The tax amounting to $1,167.86 found to be due on "prior contracts" is tax due (under section 1217(b) of the Tax Law) to Erie County or New York City on purchases made on contracts entered into prior to the imposition of the New York State sales tax and so exempt from the state tax by section 1106(a) of the Tax Law. The details with respect to these are hereby found to be as stated in Exhibit 20 in evidence, but are not here repeated since the amounts are small and they raise no issues not raised by the determination of taxes due on the purchase of supplies subsequent to the imposition of the state sales tax.

6(a) The taxpayer's business consists of the deepening or extension of navigable waterways and construction of dikes, levees and similar harbor improvements in various states and possessions of the United States as well as foreign countries. Its customers are most usually various governmental entities or large corporations which themselves do an interstate business. Typical contracts provide for both dredging and disposal of the waste material. The customer usually obtains legal permission for the dredging and applicant obtains the permit for the disposal.

6(b) The petitioner's operating costs (exclusive of overhead) on typical jobs would include the costs of mobilization of equipment which could run from 3/10 of 1% to 4% of the job. Miscellaneous costs (including the costs of surveying on land) from 3% to 5% of the job. The costs of

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dredging (including "clean-up" dredging) would be about 91% to 96% of the total costs. Of the total costs about 40% would be for tugs, about 25% for dredges, 25% for scows and 4% for launches. The dredges and launches (with costs approximating 29%) were used primarily in actual dredging while the tugs and scows (with costs approximating 65%) were used primarily in the disposal of the waste material.

7. It was typical that applicant's equipment was operated at job sites in more than one state and that they move across state lines for the purpose of assembling at a job site and for dispersal after the job was over. All told, the 17 pieces of equipment assessed, worked in 14 states and one foreign country and crossed state boundry lines 179 times during the taxable periods. The additional vessels for which the purchase of supplies were assessed, but which were not themselves subject to tax were subject to similar movement across state lines when assembling for a job or dispersing after it was completed. These trips are necessarily by sea and all of applicant's vessels are capable of making sea voyages. These vessels are licensed by the U.S. Coast Guard to engage in the coasting trade.

8. The taxpayer's work in New York was performed at job sites at three different locations: Albany County, Erie County, and the New York City area. A job site is typically a small area usually of no more than a few hundred square feet.

8(a) At Albany, material was dredged from the river bed and pumped ashore through a floating pipeline for the purpose of forming an embankment under a proposed interstate highway. The river was widened in this process.

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8(b) In Erie County, the work was primarily the deepening of channels near piers and in the bay. The disposal of waste material was at a disposal area in New York waters.

8(c) In New York City, the work was primarily the deepening of channels near piers and in the bay. Material taken from the bay would be transported to disposal areas which are licensed by the U.S. Army Corps of Engineers. Most of the time a disposal area was used which was between three and twelve miles from shore. Occasionally a disposal area was used in Long Island Sound in Connecticut waters.

9. All equipment either subject to tax or for which taxable purchases were made performed their tasks only on rivers or harbors which are part of the navigable waters or the United States.

10. When engaged in operations at a job site, the applicant's equipment performs the following operations: (a) The dredge, drillboat and crane are basically mechanical equipment mounted on barges. The dredge removes earth and other material from the bed of the harbor by its "clamshell" or "bucket", brings it to the surface, and deposits it in a scow. Over long distances, a dredge is not self-propelled and must be towed by a tug. Applicant maintains three crews for each dredge. Each crew works an eight-hour shift and is replaced by the next crew coming from shore in a launch. The drillboat is used to drill into rock or other hard surfaces under water. The cranes are lifting devices. (b) The tugs are either sea tugs which tow scows to a dumping ground or small tugs used usually as tender tugs to tow scows between the dredges and the point

where the sea tugs pick them up. Applicant maintains four separate crews for each tug. Two crews are on the tug at all times and they alternate six-hour shifts. Each crew is on board for a week at a time and a launch is used to change crews weeks. (c) A dumpscow is a small barge with several trap doors in its hull. It receives material from the dredge, carries it to a disposal area and dumps it. On long sea voyages it may be used to transport miscellaneous equipment. It is propelled by a tug. (d) Launches are small tugs used to transport men and supplies between the shore and the other vessels and to tow empty barges. Oil barges carry fuel oil from shore to the dredges and tugs.

11. The movement of the dredges while working at the job site is very limited. Its work is performed while it is fixed in one spot by "spuds" which extend to the bed of the harbor. When the dredging is completed at one spot, the dredge can move itself to its next location by the process known as "walking". This involves using the "bucket" or "clamshell" to grasp the bed of the harbor and pull the barge along using the spuds for the lever action. The cranes and drillboats presumably have the same means of locomotion. It is found, however, that neither the dredges, drillboats or cranes moved across state lines while engaged in their usual work tasks and this is true for tasks performed at Albany and Erie Counties and the New York City area.

12(a) The movement of the tugs while on the job site is determined largely by the location of the job, the mooring points and the disposal area. In Albany and Erie Counties, this did not involve the crossing of state lines.

12(b) The movements of tugs in New York Harbor were frequently across state boundaries because of the configuration of the harbor and of the state boundary. Typical movements were as follows: A tug would tow a loaded scow from a dredge working in the vicinity of Governors Island in New York waters to a mooring point at Craven Point, New Jersey, near Jersey City and in New Jersey waters. From there, a sea tug would tow the scow, and generally two other scows, down the bay through New Jersey waters until at a point off Constable Hook, New Jersey, close to Bayonne, New Jersey, it would necessarily pass into New York waters near St. George, Staten Island, and enter the Narrows between Staten Island and Brooklyn, New York. From the Narrows, it would proceed through the lower bay by way of the "Swash Channel" necessarily passing into New Jersey waters, pass close to Sandy Hook, New Jersey, and proceed about seven miles further in a southeastern direction to the disposal area, which is about five miles west of Highlands, New Jersey, and ten miles south of Rockaway Beach, New York. Each trip, one way, would take five to five and one-fifth hours.

When the weather at sea was bad, the tug would tow the scows from the mooring point through Hell Gate to Long Island Sound where at points off of Eatons Neck, Long Island, there were disposal areas. This necessarily involved navigating and maneuvering in the waters of the State of Connecticut. Other movements of the tugs were: to tow loaded scows from a location near the west side of Manhattan, southward traveling under navigation rules which require it to keep to the right, close to the New Jersey shore and in New Jersey waters, and to tow scows from the north side of Staten Island southerly to Tottenville at the southern end of Staten Island through the Kill

Van Kull and the Arthur Kill which separates Staten Island from New Jersey necessitating travel close to the New Jersey shore in New Jersey waters.

12(c) From computations of vessel activity submitted by applicant, it is found that some tugs, e.g., Dark, Feely and Lynn, in order to get to the disposal areas, crossed state boundaries on almost all the days on which they worked in New York during each year of the audit period. The tugs, Trout and Weston, had varied activities. The Trout's ratio of days on which it crossed state boundaries was 15% in 1965, 40% in 1966 and 60% in 1967. The Weston's ratio of days on which it crossed state boundaries was 30% in 1965, 98% in 1966 and 45% in 1967. However, the evidence is not sufficiently clear to show the extent of the use of each tug while operating solely in New York waters and between points solely in New York waters.

13. The movement of the scows was closely related to the movement of the tugs by which they would be towed. In Albany County and Erie County, they did not move across state lines while performing their tasks. In New York Harbor, the dumpscows crossed state boundaries on almost all of the days during which they were working in New York.

14(a) The movement of the launches and oil barges in Albany and Erie Counties did not involve the crossing of state boundaries.

14(b) The movement of the launches and of oil barges in New York Harbor was determined by the location of the job site, the facilities on shore and the other vessels. In New York Harbor, the applicant did dredging work at

many locations in New York waters including the following: Piers 7, 74 and 76 on the New York side of the Hudson River, Pier 15 in the East River, Pier 12 in Brooklyn, Lawrence Point near Astoria, Queens, and the U.S. Coast Guard piers on Governors Island. Very often a single contract would require work on both sides of the Hudson River in waters of both New York and New Jersey. The shore facilities of applicant included its offices and yard located on the north shore of Staten Island. In addition, applicant owned a dock at Tottenville on the southend of Staten Island where it could tie up scows. Applicant received delivery of gasoline, coal and water at any of several docks in New Jersey. The crews report to work at any of several points on shore which were picked for their parking facilities and from which the crew would be carried to their vessels on a launch. Applicant would have one mooring point for each contract. During this audit period, mooring points were located at Craven Point, New Jersey, and at the Raritan River between Perth Amboy and South Amboy, New Jersey. These were used on contracts for dredging done in New York waters.

14(c) The launches in New York Harbor each moved across state lines on less than 50% of the days they did some work in New York. There is no evidence as to the movement of the oil barges.

15. No other jurisdiction has assessed a sales or use tax on the equipment or supplies here in issue.

16. The failure to pay tax on the use of the equipment here in issue was based on the advice of counsel.

Determination of State Tax Commission

CONCLUSIONS OF LAW

A. None of the vessels, or the supplies purchased for the vessels can be found to be exempt under the interstate commerce clause of the United States Constitution. Certainly, the Commission must reject the major contention of the taxpayer that the vessels and supplies should be exempt because they are used in navigable waters and under the regulatory authority of the Federal Government. Similarly, the Commission must reject the contention that said vessels are exempt simply because they are used in other states and must come into New York waters by long sea voyages which cross state lines. The dredges, cranes and drillboats and the supplies purchased for them are subject to tax. Dredging operations themselves are closely analogous to construction operations on land and must be considered to be not an interstate, but a local activity. (See *Holland Furnace Co.* v. *Dept. of Treasury* 133 F2d 212 at 215-16, cert. den. 320 U.S. 747; *James* v. *Dravo Contracting Corp.* 302 U.S. 134 at 153, on remand 114 F2d 242.) Prior judicial authority supports the application of a use tax to dredging equipment. (See *In the Matter of Atlantic Gulf & Pacific Co.* v. *Gerosa* 16 N.Y. 2d 1; App. Dism. 382 U.S. 368 (1966)). The use of the other vessels in this case was ancillary to the use of the dredges in dredging operations.

Furthermore, even if the dredges and also the other vessels, are construed to be operating in interstate commerce, such vessels would be subject to a use tax if only there was a "taxable moment" when they were not, in fact, being operated in interstate commerce. (See *In the Matter of Atlantic Gulf & Pacific Co.* v. *Gerosa* 16 N.Y. 2d 1 at quoting from *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 at 177; see also *Niagra Junction Railway Co.* v. *Greagh,* 2 A D 2d 200, aff'd 3 N Y 2d 831.)

Determination of State Tax Commission

In this case the description of the vessels activity in New York State have not been detailed enough to negate the existence of such a "taxable moment" with respect to each vessel. In view especially of applicant's yard and dock facilities in New York, it can be presumed and is likely that such a "taxable moment" did exist with respect to each vessel. At any rate, the applicant has not carried the burden of proof with respect to this element of the case.

B. The statutory exemption of section 1115(a)(8) cannot be construed to apply to the vessels and supplies in issue in this case. Dredging and the operations ancillary thereto are most appropriately characterized as part of local and not interstate commerce. Furthermore, there is a lack of proof with respect to individual vessels to show the exact proportion of use of each of such vessels in local commerce in New York, local commerce in other states and in interstate commerce. The evidence submitted in terms of days of use is not refined enough to permit an evaluation of the use of each vessel.

C. The failure to pay tax in this case was excusable for the purposes of the penalty provisions of section 1145(a) of the Tax Law.

DETERMINATION

The determination under review and as already redetermined under paragraph 2 above is further modified to exclude therefrom any penalty or interest to the extent either penalty or interest exceeds interest at the rate of 6% a year and, as so modified, said determination is found to be correct and is due together with such further

Determination of State Tax Commission

interest from the date theerof as shall be computed under section 1145(a) of the Tax Law.

DATED: Albany, New York
March 7, 1974

STATE TAX COMMISSION
(Illegible)
Commissioner

(Illegible)
Commissioner

(Illegible)
Commissioner

Relevant Statutes

§1111. *Special rules for computing receipts and consideration*

(b) Tangible personal property, which has been purchased by a resident of New York state outside of this state for use outside of this state and subsequently becomes subject to the compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided, however:

(1) That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this state, such property shall be taxed on the basis of current market value of the property at the time of its first use within this state. The value of such property, for compensating use tax purposes, may not exceed its cost.

(2) That the compensating use tax on such tangible personal property brought into this state (other than for complete consumption or for incorporation into real property located in this state) and used in the performance of a contract or subcontract within this state by a purchaser or user for a period of less than six months may be based, at the option of the taxpayer, on the fair rental value of such property for the period of use within this state.

§ 1115. *Exemptions from sales and use taxes*

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

• • •

(8) Commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship).

• • •

§ 1118. *Exemptions from use tax*

The following uses of property shall not be subject to the compensating use tax imposed under this article:

• • •

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall appy to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at at higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this

subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction. In such event, the amount payable shall be allocated between the tax imposed by this article and the tax imposed pursuant to article twenty-nine in proportion to the respective rates of such taxes.

UNITED STATES CONSTITUTION ARTICLE 1 SECTION 3 (CLAUSE 3)

"The Congress shall have Power • • • To regulate commerce with Foreign nations among the several States, and with the Indian Tribes;"

United States Code Annotated "Constitution Article 1, Section 1 to Article 1 Section 8 Clause 3" at pp. 207, 241)".

FOURTEENTH AMENDMENT TO THE CONSTITUTION SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Annotated "Constitutional Amendments No. 13 to No. 14" at page 33.

Judgment of the Supreme Court, State of New York

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

INDEX No. 5968/74

In the Matter of GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner-Respondent,

—against—

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Appellant.

The Appellant, Department of Taxation and Finance of the State of New York, having appealed to the Court of Appeals of the State of New York from an order entered in the Office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department on the 2nd day of April 1975 which annulled the determination of Appellant which sustained a Sales and Use Tax assessment imposed against Petitioner-Respondent, Great Lakes Dredge and Dock Company, 17 Battery Place, New York, New York and granted the petition of Petitioner-Respondent, and the Court of Appeals, after due deliberation, having rendered a decision on the 30th day of March, 1976 reversing the order of the Appellate Division—Third Department with costs, it is hereby:

ADJUDGED, that said order be and the same hereby is reversed, the determination of the State Department of

Judgment of the Supreme Court, State of New York

Taxation and Finance of the State of New York confirmed and the petition dismissed with costs of $794.75 to Appellant Department of Taxation and Finance of the State of New York.

JOSEPH A. YAVONDETTE
Clerk

DATED:

Order for Judgment on Remittitur of the Supreme Court, State of New York

STATE OF NEW YORK

SUPREME COURT—ALBANY COUNTY

INDEX No. 5968/74

In the Matter of GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner-Respondent,

—against—

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Appellant.

Present:

HON. ROBERT C. WILLIAMS
Justice Presiding

The above-mentioned appellant having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered on the 2nd day of April, 1975, in the Office of the Clerk of said Court, and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be reversed and judgment entered for the appellant, with costs, and the remittitur from the Court of Appeals having been filed in the Office of the Clerk of Albany County,

Order for Judgment on Remittitur of the Supreme Court, State of New York

Now, on motion of Louis J. Lefkowitz, by Francis V. Dow, it is

ORDERED that the judgment of the Court of Appeals be, and the same hereby is made the judgment of this Court; and that a judgment of this Court be entered herein reversing said judgment, with costs of said appeal to be taxed against petitioner-respondent.

Signed this 26th day of April, 1976 at Monticello, New York.

ENTER

ROBERT C. WILLIAMS
Justice, Supreme Court
Albany County